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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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AIDA ELZAGALLY, et al., : Criminal Action No.  
: Plaintiffs, :  
: versus : 1:19-cv-853 and 1:20-cv-170  
: KHALIFA HAFTAR, et al., : September 29, 2020  
: Defendants.:

The above-entitled Motions hearing was heard, via teleconference, before the Honorable Leonie M. Brinkema, United States District Judge.

## A P P E A R A N C E S

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## PROCEEDINGS

(Court proceedings commenced at 11:56 a.m.)

6 All right. And we have counsel for that case?

7 MR. GILL: Yes, Your Honor. Faisal Gill for the  
8 plaintiffs.

9 MR. LEVIN: Good afternoon, Your Honor. Duncan  
10 Levin for defendant, Khalifa Hafttar.

11 THE COURT: All right. Now, this is a case  
12 involving seven counts. We have the Alien Tort Claim Act. We  
13 have the Torture Victim Protection Act. And then we have five  
14 Virginia state law claims.

15 And we have before us today the defendant's motion  
16 to dismiss, which raises multiple grounds, some of which  
17 dovetail with the other case, which is 20-cv-170. Which there  
18 is an overlap of some of these issues about whether we have a  
19 political question involved here, whether the claims are  
20 justiciable. We have -- so there is an overlap. I'm  
21 assuming, however, that we should -- I'm not assuming, I'm  
22 going to assume that we should take the two cases, to some  
23 degree, separately.

24 Has there -- I want to ask defense counsel -- and  
25 who is going to be the main spokesperson for the defense?

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1 MR. LEVIN: I'm sorry, Your Honor?

2 THE COURT: Who is the main spokesperson?

3 MR. LEVIN: This is Duncan Levin.

4 THE COURT: All right. Mr. Levin, you're going to  
5 be in both cases?

6 MR. LEVIN: Yes, Your Honor. In this case, the --  
7 if I may refer to them just as a shorthand. One starts with  
8 2019, and one starts with 2020. So if it pleases the Court, I  
9 could refer to one as the '19 case and one as the '20 case.

10 THE COURT: We're on -- we're on '19 right now.

11 MR. LEVIN: Correct. And so, for this case, I  
12 represent defendant, Khalifa Haftar. And on the '20 case, I  
13 represent three defendants: Khalifa Haftar and his two sons,  
14 Khalid and Saddam Haftar.

15 THE COURT: Right. I recognize that.

16 All right. And we have a different group of  
17 plaintiffs and we have different plaintiff's counsel, correct?

18 MR. GILL: Yes, Your Honor.

19 THE COURT: All right. But I want to look at 853,  
20 the '19 case first.

21 MR. LEVIN: Yes, Your Honor.

22 MR. GILL: Yes, Your Honor.

23 THE COURT: All right. Mr. Gill.

24 MR. GILL: Yes, Your Honor.

25 THE COURT: All right. What actual evidence do you

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1 have in this case that supports your theory that your clients'  
2 families were somehow targeted by the defendant?

3 Wait a minute.

4 (Telephone interruption.)

5 MR. GILL: I'm sorry, Your Honor. I can't hear you.

6 THE COURT: I know. We can't work if we have this  
7 much calling in. This is becoming difficult to hear you all.

8 (Telephone interruption.)

9 THE COURT: Counsel, we're not going to work if we  
10 have this many people calling in. I can't control it right  
11 now.

12 (Telephone interruption.)

13 THE COURT: I'm going to continue this matter until  
14 3 o'clock this afternoon, gentlemen. There's too many people  
15 calling in. I'm going to arrange it so that only the  
16 attorneys can call in on this call. There's too much  
17 interference with these beeps.

18 MR. GILL: Your Honor, if I may, I think that's  
19 fine, but it may just be because it's noon right now and it  
20 will quiet down in one minute as it turns into noon. And if  
21 everyone can mute their line, I think people will probably  
22 stop calling in in about a minute.

23 (A pause in the proceedings.)

24 THE COURT: We'll try one more time and if it gets  
25 bad again, we're just going to continue the case.

1 (Continued telephone interruption.)

2 THE COURT: It's too many calls. All right. We're  
3 going to stop this. We'll reconvene at 3 o'clock. We'll make  
4 the phone call. We'll set it up this way, but I'm not going  
5 to have anybody calling in except for counsel. All right.

6 MR. GILL: Yes, Your Honor.

7 MR. LEVIN: Yes, Your Honor.

8 THE COURT: Thank you. Bye-bye.

9 **(Proceedings recessed at 12:01 p.m.)**

10 (Court proceedings recommenced at 3:06 p.m.)

11 THE COURT: Counsel, I hope that we are now quietly  
12 on the phone. So these are the two related cases of Aida  
13 Elzagally, et al., versus Khalifa Haftar, et al. Civil action  
14 19-cv-853.

15 And Muna al-Suyid, et al., versus Khalifa Haftar, et  
16 al. Civil action 20-cv-170.

17 So let's start off again with counsel.

18 Mr. Faisal Gill, are you there for the plaintiff,  
19 Elzagally?

20 MR. GILL: Yes, Your Honor, I am.

21 THE COURT: All right. And then for our other  
22 plaintiff, is it Mr. Carroll?

23 MR. CARROLL: Yes, Your Honor.

24 THE COURT: All right. And you're the only two  
25 attorneys representing the plaintiffs; is that correct, for

1 today's hearing?

2 MR. GILL: We're the only two that will be speaking.

3 THE COURT: All right. It's going to be important  
4 when you speak to say your name first so my court reporter can  
5 get you.

6 And now, for the defense, Mr. Levin, it's still you  
7 for the defendants in both cases, correct?

8 (No response.)

9 THE COURT: Mr. Levin, are you there? Hold on.  
10 We're trying to get you, Mr. Levin.

11 (A pause in the proceedings.)

12 THE COURT: Mr. Levin, are you there? Is there  
13 anybody on the phone for the defendants? Hello?

14 MR. UNGVARSKY: Judge, this is attorney Edward  
15 Ungvarsky. I am on the phone. I can hear you. Mr. Levin can  
16 hear you. He's present on the call.

17 (Telephone interruption.)

18 THE COURT: I don't know what that grinding sound  
19 is. We're getting a real problem.

20 Mr. Levin -- why are we not able to get him,  
21 Counsel, do you know?

22 MR. UNGVARSKY: No. He was on. He spoke to your  
23 law clerk and then I know she took his number and she said  
24 that we would be unmuted. Mr. Levin is suggesting that he  
25 redials in now.

1                   THE COURT: All right. Go ahead and have him  
2 redial.

3                   MR. UNGVARSKY: All right. He can hear you, Judge.  
4 He heard you say that, Judge, so he's going to hang up.

5                   While he does that, Judge, I'm going to put mute on  
6 myself so there's no background noise from my room.

7                   THE COURT: Thank you.

8                   (A pause in the proceedings.)

9                   MR. UNGVARSKY: Judge, Mr. Levin is back on -- this  
10 is Edward Ungvarsky. I apologize. Mr. Levin is back on the  
11 call. He says that, again, the automatic message says he's in  
12 "listen-only mode." He thinks he needs to be unmuted.

13                   THE COURT: I don't know why we're having these  
14 problems. Let's try for a couple more minutes.

15                   (A pause in the proceedings.)

16                   MR. LEVIN: I think I was unmuted now. This is  
17 Duncan Levin.

18                   THE COURT: All right.

19                   MR. LEVIN: Sorry about that.

20                   THE COURT: That's fine. Again, when you all are  
21 speaking, if you'll just, again, state your name so that we  
22 get the right words attributed to the right attorney, all  
23 right, because we are on the record.

24                   As we started out earlier, we have the defendant's  
25 motions to dismiss. And I think we had started with the

1 853 -- sorry, the -- the case filed in 2019, which is cv-853.  
2 And that's the Elzagally versus Khalifa Haftar. Just one  
3 defendant in that case.

4 So it's your motion, Mr. Levin. You may start.

5 MR. LEVIN: Well, thank you, Your Honor. I would  
6 say that there are so many different reasons that this case  
7 should not go forward and should be dismissed, respectfully.

8 The first is that the plaintiff could not properly  
9 serve the defendant in this case. And beyond the problem of  
10 service, there are two other sort of major problems hanging  
11 out before even getting into the fact that they did not make  
12 out a cause of action under the TVPA.

13 One is that this is a nonjusticiable political  
14 question. The Court is basically being asked to adjudicate  
15 the conduct of the armed forces of a foreign government that  
16 is actively working with the United States to try to bring  
17 peace to the region. And General Haftar is entitled to  
18 immunity under this suit, under law, because he is the head of  
19 the state.

20 And then, if the Court could even get past all of  
21 those problems, which we submit are fatal problems, there  
22 are just fundamental problems with the plaintiff's allegations  
23 because they don't show any cause of action under the TVPA.  
24 The magistrate judge's support and recommendation picked up on  
25 the fact that there really is, other than very general

1 allegations about random shelling, there's just not any  
2 evidence alleged by the plaintiff that these -- that the  
3 acts meet the definition of extrajudicial killing. That they  
4 were -- that, you know, any of these killings were deliberated  
5 in any way.

6 And they also go -- show that they've exhausted  
7 their remedies in Libya, which is a requirement, as well. The  
8 Virginia tort actions should be dismissed, as well, because  
9 they hinge on -- a reading of the Alien Tort Claims Act just  
10 cannot be sustained because none of the conduct that's alleged  
11 touches and concerns the United States.

12 So I don't know if there's a particular order you  
13 would like me to address any of those in. But I would just  
14 say we have so many different bases by which we submit that  
15 this case should be dismissed. That in order for it to go  
16 forward, the Court would have to find: One, that this was  
17 properly served on General Haftar. Two, that he is not the  
18 head of the state. Three, that this is a justiciable  
19 political question.

20 And then after getting through all of that, that  
21 they're actually the cause of action under the TVPA that these  
22 plaintiffs have alleged. There are just so many problems on  
23 the way to get there that -- and we submit that the Court need  
24 not find on all of them. But any number of them, any one of  
25 them would be enough to get this case dismissed.

1                   THE COURT: All right. Well, Mr. Levin, let me ask  
2 you this question.

3                   MR. LEVIN: Yes, Your Honor.

4                   THE COURT: In the *Samantar* case, which both sides,  
5 I think, have cited to, that I had several years ago, it was  
6 the defense attorney who had aggressively, initially reached  
7 to the State Department to try to get their position on some  
8 of the same issues you're raising, both political question and  
9 head of state immunity.

10                  Have you -- and the first of these two cases was  
11 filed back in June of 2019.

12                  Have you done anything along those lines on behalf  
13 of your clients?

14                  MR. LEVIN: Well, Your Honor, the answer is no. But  
15 I respectfully submit that we do not even need to get to that  
16 issue before. There are easier ways to have this case  
17 dismissed on service grounds. The nonjusticiable political  
18 question does not require the executive branch to weigh in.  
19 But on the head of state immunity question, solely looking at  
20 that one doctrine, frankly, I think that this situation is  
21 different because, number one, plaintiffs have not -- if they  
22 don't believe that General Haftar is the head of state,  
23 they've offered no reason to believe that anybody else is the  
24 head of the state. So they have not actually identified any  
25 alternative person who is the head of the state.

1                   Libya is at civil war right now. In fact, there's  
2 been a development since we filed our motion to dismiss on  
3 this point. As recently as September 12th, the Associated  
4 Press is reporting that the United States Embassy in Libya is  
5 specifically in direct negotiations with General Haftar to  
6 reopen oil field terminals that have been under an eight-month  
7 blockade.

8                   So this is something that even since we filed the  
9 motion to dismiss, there's evidence of direct negotiations  
10 between the United States and General Haftar over these oil  
11 fields.

12                   But even before that, as cited in our moving papers,  
13 President Trump has had discussions directly with General  
14 Haftar about how to fight terrorism and deter Libya's oil  
15 resources. They've discussed a shared vision for Libya's  
16 transition to a stable democratic political system.

17                   So I think the answer is, no, there is not a formal  
18 decision yet from the State Department, but we feel that there  
19 is ample evidence that we --

20                   (Telephone interruption.)

21                   THE COURT: Wait. Why is there -- we shouldn't be  
22 hearing any noise while one lawyer is speaking. I'm sorry.

23                   Mr. Levin, can you repeat your last statement,  
24 because it became garbled.

25                   MR. LEVIN: Yes, Your Honor.

1           I was saying that there really -- there's ample  
2 evidence that General Haftar is the head of the state, and  
3 both from all the public reporting, and most recently this --  
4 the negotiations between the United States Embassy and Libya  
5 and General Haftar directly. We know he's been in touch with  
6 the President of the United States. I don't believe there is  
7 a formal ruling from the State Department like in the *Samantar*  
8 case.

9           But in this particular case, we feel that there is  
10 ample evidence that he is the head of the state. The  
11 plaintiff has not identified anyone else who is the head of  
12 the state. And frankly, it's a question that I don't think  
13 the Court need even reach to dismiss the case because there  
14 are other -- there are other ways that the case can be  
15 dismissed without having the executive branch weigh in.

16           And, in fact, it dovetails -- if I may, Your Honor,  
17 it dovetails into this issue of a nonjusticiable political  
18 question. They're interrelated doctrines. But what the Court  
19 is being asked to do is adjudicate Haftar's armed forces in a  
20 way that directly implicates the doctrine of the  
21 nonjusticiable political question. And I don't believe that  
22 there's any law that requires the executive branch to weigh in  
23 on whether it's a nonjusticiable political question.

24           The Supreme Court in *Baker v. Carr* laid out this  
25 doctrine and it was adopted by the *Schneider v. Kissinger*,

1 which we outlined in our moving papers. But one such -- one  
2 such -- the presence of a number of different facts would make  
3 it such that it's a nonjusticiable political question. And  
4 one of them is the possibility of a Court's undertaking  
5 independent resolution without expressing a lack of respect to  
6 coordinate branches of government.

7                   And here, this is basically exactly asking the Court  
8 to adjudicate just that. So I don't believe that there's any  
9 reason to go to the State Department to get them to render a  
10 formal decision when there are other ways that -- there are  
11 other reasons that the case should be dismissed.

12                   THE COURT: All right. You know that though --

13                   MR. LEVIN: And it should be dismissed.

14                   THE COURT: -- this Court has taken the position  
15 that even the United States government does not have sovereign  
16 immunity against claims that's been involved in jus cogens  
17 violations. And so, I think regardless of some of the  
18 arguments you've made, if there is sufficient allegation in a  
19 complaint of those types of human rights violations, at least  
20 at a pleading stage, that's sufficient to let it survive.

21                   I mean, again, we're not -- even though I think your  
22 motions are -- these are motions to dismiss, they're not  
23 motions for summary judgment, and they couldn't be at this  
24 point because there's not been any discovery conducted. I  
25 mean, there are other problems with these cases just given the

1 nature of what's alleged and the types of discovery one might  
2 need to have before they could be ready for summary judgment.  
3 But in terms of -- I want to try to at least pare these cases  
4 down somewhat.

5 So let me ask defense counsel -- I'm sorry  
6 plaintiff's counsel, starting with you, Mr. Gill, if, in fact,  
7 you feel you can save any of your state law claims.

8 MR. GILL: Yes, Your Honor, I believe I can. I  
9 mean, at the end of the day, Your Honor, Mr. or General Haftar  
10 is a U.S. citizen. He is a Virginia resident, and he is  
11 committing what we believe to be these atrocities. He's  
12 committing murder. He's committing -- he is bombing. He is  
13 killing. Therefore, we believe that under state law, he  
14 should be liable for those claims.

15 A U.S. citizen, a Virginia resident, if he does that  
16 anywhere else, they would be liable. For that reason, I do  
17 believe the state law claims would survive at least at this  
18 stage.

19 Now, I would have to make out the case for it all,  
20 which we believe, when we get to the discovery phase, that we  
21 believe that we can make the case for it.

22 THE COURT: Well, if a Virginia resident went into  
23 Maryland and committed the torts in Maryland, where would the  
24 tort litigation occur?

25 MR. GILL: Your Honor, if a Virginia resident

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1 committed the tort in Maryland, I would argue that it could --  
2 more than likely would occur in Maryland since that is where  
3 the actions took place. But I do also feel that Virginia  
4 courts could also have jurisdiction over its own resident.  
5 Certainly, a Virginia prosecutor could charge the person for  
6 committing some of these things. And again, we're charging  
7 him with wrongful death.

8 THE COURT: Whoa, whoa, whoa. I don't think you're  
9 right on criminal law. If a Virginia resident went over to  
10 California and committed a crime in California, the Virginia  
11 courts couldn't handle that. That's a California court.

12 MR. GILL: Well, that's what normally happens, Your  
13 Honor. But I think in our case -- I'm handling a criminal  
14 case right now in Southern District of Indiana, where the  
15 majority of the actions occurred in Michigan. But if there's  
16 a slight connection in the State of Indiana, the federal court  
17 claimed that jurisdiction there. It all depends on --

18 THE COURT: Right, but it has to be an act. It  
19 can't just be the status of the person is a citizen of that  
20 state. I've never seen that in a criminal case.

21 You're right, it only takes -- it only takes an  
22 e-mail message into the jurisdiction or you're flying through  
23 Dulles Airport and everything else occurs outside of some  
24 other location. That one minimal contact with the forum can  
25 do it.

1           But you don't allege -- neither plaintiff has  
2 alleged, in either of their complaints, that any of the  
3 actions that are described in these two complaints had any --  
4 any connection whatsoever to this district other than the fact  
5 that the defendants are U.S. citizens who own property in  
6 Virginia.

7           Is that not correct, Mr. Carroll? Do you agree?

8           There's nothing that I see in the complaints that  
9 would suggest that any of the Virginia causes of action can go  
10 forward.

11           MR. CARROLL: Your Honor, this is Kevin Carroll.  
12 Both defendant's arguments about the state law claims were  
13 well put, and we're prepared to waive those. This is at heart  
14 a Torture Victim Protection Act case and we strongly disagree  
15 with the arguments on the TVPA.

16           THE COURT: Okay. All right. I think, Mr. Gill,  
17 those portions of the complaints that are alleged Virginia  
18 causes of actions. In the one case, there's a time bar  
19 problem, too, because those events are alleged to have  
20 occurred in 2014, and there's a two-year statute of  
21 limitations for these types of torts in Virginia.

22           Also, I just don't see how there's any connection  
23 between those activities and the forum other than the fact  
24 that the defendants owned property. There's no allegation the  
25 property was used somehow to support these activities.

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1 It's just -- there's just nothing. So the state law claims in  
2 both complaints will be dismissed.

3 Then in terms of the Alien Tort Claims Act, I'll  
4 have the plaintiffs respond on those first.

5 MR. GILL: I'm sorry, Your Honor, was that directed  
6 towards me?

7 THE COURT: Yes, Mr. Gill.

8 MR. GILL: Faisal Gill. Okay.

9 Yes, Your Honor. We believe the Alien Tort Claims  
10 Act does survive because, unlike in other cases, the biggest  
11 one being the *Warfaa v. Ali* case, this case here, there is a  
12 U.S. citizen involved. So for that reason we believe that it  
13 does touch and concern the United States, which is what the  
14 Supreme Court has stated.

15 So because Mr. -- General Haftar is a U.S. citizen,  
16 we believe that the Alien Tort Claims Act does survive. And  
17 that was the main distinction between what we have in our  
18 facts and what was in the *Warfaa v. Ali* case.

19 THE COURT: All right. Mr. Levin, do you want to  
20 respond to that?

21 MR. LEVIN: Your Honor, I do. I disagree with that.  
22 I mean, the Alien Tort Claim Act really -- it is a  
23 jurisdictional statute and it basically -- to go forward, a  
24 claim has to touch and concern the U.S. with sufficient force  
25 to displace the presumption against exterritoriality where

1 there is a presumption here. And at least the Ninth Circuit  
2 has weighed in on this in the *Mujica* case, that U.S. citizen  
3 alone does not satisfy this test.

4                   Once again, nothing happened here in the United  
5 States. They're trying to ram a lot of behavior, alleged  
6 behavior through this that all took place outside of the  
7 United States through the notion that because he is a U.S.  
8 citizen, he can be held responsible. But the behavior -- just  
9 like the Virginia tort case, the Virginia tort claim, the  
10 Alien Tort Claims Act simply does not apply unless the conduct  
11 of the claims themselves touch and concern the United States  
12 to -- this was not forced to displace this presumption. We  
13 just have a disagreement that the U.S. citizenship alone would  
14 satisfy this test. And there is precedent. There aren't a  
15 lot of cases on this point, but to the extent that there are  
16 any cases -- there's this Ninth Circuit case, *Mujica*, that  
17 takes the exact position that I'm espousing here.

18                   THE COURT: All right. And, of course, again, I  
19 have the *CACI* case, which you've also mentioned in your  
20 papers, and there it's a very different situation because the  
21 defendant corporation is a U.S. corporation. Although all the  
22 events occurred in Iraq, they occurred because -- the  
23 connection to the United States is that the corporate  
24 defendant was functioning in Iraq under a contract that had  
25 the U.S. government. It was taking -- it's allegedly taking

1 directions from U.S. military.

2 In other words, there was definitely clear  
3 connections with the United States that would give us a basis  
4 to find that, you know, there was the kind of contact with  
5 this country that would give us the extraterritorial reach for  
6 that conduct.

7 That's totally different, again, because there's  
8 nothing in these complaints that have that kind of linkage.  
9 And even the timeframe is problematic. Although, one of the  
10 complaints, I think in *Elzagally*, it alleges that Haftar left  
11 the United States or the Northern Virginia in 2015. I note  
12 that the *al-Suyid* case alleges that he left in 2011. And it  
13 appears as though that that 2011 date is the more accurate  
14 date.

15 So today is now 2020, and at least, you know, within  
16 the four corners of these complaints, it would appear as  
17 though Haftar has not even been in the district for quite some  
18 time. Even if he's coming back and forth and making an  
19 occasional visit, again, there's been no description of any  
20 activity in the forum, in the United States, that is connected  
21 to the events in Libya other than this man's citizenship.

22 So at least as the complaints are currently  
23 structured, I don't see how one can argue that there's enough  
24 in the complaint to support an alien tort claim.

25 Does either plaintiff's counsel want to add anything

1 to this?

2 MR. CARROLL: Your Honor, Kevin Carroll. Just  
3 stating for the record that our complaint does not include an  
4 alien tort statute.

5 THE COURT: Right. Yours is the TVPA. I understand  
6 that.

7 But, Mr. Gill, is there anything further you want to  
8 add?

9 MR. GILL: Your Honor, I would only add that in the  
10 *Kiobel* case, the Supreme Court did state, although broadly  
11 stated, it's the claims rather than the alleged tortious  
12 conduct that must concern the United States territory with  
13 sufficient force.

14 And we believe the fact that he is a U.S. citizen  
15 satisfies what, you know, *Kiobel* is saying, if you broadly  
16 construe it. But all the actions (audio interruption), but as  
17 long as there is some testing and concern, and certainly the  
18 fact that he is a U.S. citizen absolutely touches and concerns  
19 the United States that satisfies what we believe in *Kiobel*.  
20 And as you cited in *CACI*, it was U.S. contractors. It was a  
21 U.S. company. Yes, they were operating and/or operating in  
22 Iraq. So in that sense, we do believe that there -- it is  
23 fairly similar.

24 THE COURT: I think there is significant factual  
25 differences between -- it's not even close. As I said

1 earlier, there is far more direct connection between the  
2 United States and that. It's not just a corporation that  
3 happens to be doing something in a foreign country. So I'm  
4 going to grant that portion of the motion to dismiss.

5 So that leaves in both cases then the TVPA claim,  
6 which is the core complaint of the claim here.

7 And on that one, I recognize that there are a lot of  
8 these technical arguments that are made by the defendant, but  
9 I certainly think that the allegations are very problematic.  
10 I mean, there are allegations of some very, very serious  
11 conduct. Especially in the -- in the *Elzagally* case. These  
12 two cases are hard to do separately because there is such a  
13 great deal of overlap.

14 But *Elzagally* only lists Mr. Haftar as the  
15 defendant, correct? And the *al-Suyid* case also includes the  
16 sons.

17 I wanted to address that one next. That's right.

18 Mr. Carroll, that's your case. What evidence do you  
19 have at this point that would, other than sort of information  
20 and belief or suspicion, that the two sons are at all involved  
21 in the specific allegations that the plaintiffs are raising?

22 MR. CARROLL: Thank you for asking, Your Honor.  
23 Again, this is Kevin Carroll. Both of the sons were battalion  
24 commanders in the Libyan National Army in Benghazi in  
25 October/November 2014. And that is where the --

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1                   THE COURT: Wait, I'm sorry. Mr. Carroll, I don't  
2 know what you're talking on, but you're breaking up.

3                   Are you on a speakerphone or on a computer? Hello?

4                   MR. CARROLL: Hold on, Your Honor. Sorry, Your  
5 Honor. I took it off speaker. Is that better?

6                   THE COURT: Much better. Go ahead.

7                   MR. CARROLL: Okay. Thank you, Your Honor. I'm  
8 glad you asked the question. Khalid and Saddam Haftar were  
9 both battalion commanders in the Libyan National Army --

10                  THE COURT: Wait, wait. I'm sorry. Wait. Slow  
11 down, please.

12                  (Court reporter clarification.)

13                  THE COURT: Start over again, please, Mr. Carroll.

14                  MR. CARROLL: Yes, Your Honor. Khalid and Saddam  
15 Haftar were both battalion commanders in the Libyan National  
16 Army in Benghazi in October/November of 2014, when the crimes  
17 in question took place. Our understanding is that the officer  
18 corps of the Libyan National Army that was present in  
19 Benghazi, when the war crimes took place, only amounted to 27  
20 officers.

21                  They served as close adjutants to their father.

22                  Saddam Haftar is additionally involved in fundraising for the  
23 Libyan National Army.

24                  So I think that under the doctrine of command  
25 responsibility, which even impacts decisions, field grade

1 officers at the battalion commander level, ten colonels  
2 present while war crimes are taking place, would be liable as  
3 well.

4 THE COURT: All right. Mr. Levin.

5 MR. LEVIN: Thank you, Your Honor. This is Duncan  
6 Levin. I have to say I have been scratching my head at this  
7 one because we've been looking through the complaint for any  
8 specific evidence that the sons, in fact, are alleged to have  
9 been tied to any specific incidents at all, which they are  
10 not. The theory is under this command responsibility  
11 doctrine, which we, of course, adopt just like the Court has.  
12 But if you look -- if Your Honor looks at the elements of it,  
13 that's been laid out in the *Drummond's* case.

14 If I may: "The existence of a superior subordinate  
15 relationship between the commander and the perpetrator of the  
16 crime..." which has not been laid out, "that the commander  
17 knew or should have known, owing to the circumstances at the  
18 time, that his subordinates had committed, were committing, or  
19 plan to commit acts violative of the law of the war," which  
20 has not been laid out, "and that the commander failed to  
21 prevent the commission of the crimes or failed to punish the  
22 subordinate after the commission of the crimes." Which has  
23 not been laid out.

24 If I may offer my observation, I believe that the  
25 plaintiffs have included the sons because they owned property

1 in the United States and they are trying to pierce the veil  
2 and somehow try to get at the sons' property in the United  
3 States. But frankly, there are just no facts whatsoever in  
4 its complaint that specifically ties the sons to any of the  
5 activities whatsoever.

6 There were, assuming that there were 27 officers, as  
7 the plaintiffs just laid out, the plaintiffs' theory could be  
8 viewed that all 27 officers are liable. But not all of the 27  
9 would be in the chain of command as to the acts. And there's  
10 just no showing that the sons are, in fact, in the chain of  
11 command as to the allegations.

12 The complaint is just devoid of anything regarding  
13 the sons. And we submit that for these reasons, the claims  
14 against the sons should be dismissed.

15 THE COURT: All right. Mr. Carroll, do you want to  
16 have the last word on that?

17 MR. CARROLL: Yes, Your Honor. As the complaint  
18 lays out, we know the three-star who is responsible, Khalifa  
19 Haftar. We know the two-star major generals who were  
20 responsible for the atrocity by name.

21 We know the full-bird colonels who were responsible  
22 for the atrocities, and we know that the sons were battalion  
23 commanders. So we know exactly who committed the crimes at  
24 the three-star corps level, the two-star division level, the  
25 full colonel brigade level, and we know that the sons were

1 lieutenant colonels present in the city while this was going  
2 on.

3 And this would seem to me to be a good subject for  
4 discovery, to see exactly what full colonel -- Lieutenant  
5 Colonel Saddam Haftar, Lieutenant Colonel Khalifa Haftar  
6 reported to while they were in Benghazi, while the war crimes  
7 were taking place in the fall of 2014.

8 THE COURT: Well, you know, that's not really the  
9 way in which civil litigation is supposed to be conducted in  
10 federal court. I mean, the lawyers are supposed to have a  
11 decent understanding of the facts and not just file the  
12 complaint and then hope that the discovery will support their  
13 position.

14 I am going to grant the motion to dismiss the sons.  
15 The complaint as written right now before me simply does not  
16 have enough in it.

17 However, as to Mr. Haftar himself, those -- there  
18 are certain paragraphs in this complaint that have the kind of  
19 specificity that would clearly be sufficient at this pleading  
20 stage to allow the case to go forward against him under the  
21 command control doctrine. In particular, I suppose it's  
22 paragraph 46 is the most compelling, where it's alleged that  
23 Khalifa released a video announcing that LNA's opponents would  
24 be shown "no mercy." But there is no prisoner -- that  
25 prisoners are -- no prisoner -- no prison for them, that the

1 field is the prison, end of story.

2 And then there's also reference in paragraphs 27 and  
3 35 to other statements made by LNA's. There's a video  
4 announcement that the opponents will all be liquidated. And  
5 another one indicating the expulsion of certain groups from  
6 Benghazi, and that the plaintiffs in this case were among  
7 those types of folks.

8 So I think there's enough in that complaint to allow  
9 the allegations against Haftar himself to go forward, but not  
10 the sons. So I will be granting that portion of the motion to  
11 dismiss as well.

12 So essentially, what that's leaving in both cases is  
13 the TVPA claim. And I recognize the defendant has made a  
14 bunch of other arguments about that.

15 In terms of the service argument, although it is  
16 true that it does appear to be a technical problem with  
17 service, the whole point behind the service rules, in my view,  
18 is to make sure that due process is protected. And what due  
19 process provides is that there be notice and an opportunity to  
20 be heard. And whether that notice came through the media or  
21 some other kind of means, certainly the defendants were aware  
22 of the lawsuit.

23 They were able to retain you, Mr. Levin, and you've  
24 articulated very strong arguments on their behalf. You came  
25 in after the defaults had been entered, and we set aside the

1 defaults so that your clients now have their opportunity in  
2 court to respond to the allegations. And I don't know why  
3 that's not sufficient to get around the service issue.

4 MR. LEVIN: May I address that, Your Honor.

5 THE COURT: Yeah.

6 MR. LEVIN: Thank you. Your Honor, I think, if I  
7 may. If that is true, then what the Court is saying, in  
8 essence, is that there's no way for a defendant to come into  
9 federal court and argue service failure, because the service  
10 rules are meant to ensure that the -- that a defendant is  
11 apprised of a case against him or her.

12 In this particular case, the service was not  
13 effectuated properly. We've timely raised the problems with  
14 it. And these are more than technical violations, because  
15 what we've done is, we've come in to argue service. But what  
16 the Court is saying is, by the mere fact that he is now aware  
17 of the case, has hired counsel, and come in to argue it, that  
18 no one can bring a lawyer into court and argue service because  
19 they are, by definition, aware of the fact that there is a  
20 lawsuit.

21 And so, I do think that the issues are more than  
22 just technical. Both of the cases certainly were served  
23 improperly in different ways. But I -- I fully hear what the  
24 Court is saying. But I do think that the Court's position  
25 would not allow defendants to come in and argue service

1 because they would, by definition, have a lawyer be arguing  
2 about something that they knew about.

3 THE COURT: Well, I mean, again, as I said, if the  
4 whole purpose, and it's a good purpose, behind the service  
5 rules is to ensure that a party is on notice as to the case  
6 that's been brought against them and has a chance to respond  
7 to it.

8 In my view, it's meant to prevent, you know,  
9 improper defaults, and that's exactly what's happened here.  
10 You've got notice of it. Had the default judgments been  
11 entered down the road and you've come in and try to have them  
12 set aside, this would possibly be a different situation. But  
13 at this point, I don't think that due process has been  
14 violated.

15 I mean, your clients know about this case. Two of  
16 them have been dismissed, and we only have one claim per each  
17 case against Khalifa Haftar. And as to that, then you've got  
18 these other sort of meatier issues about whether this is an  
19 improper political question that the Court does not have the  
20 authority to address. The head of state immunity argument, I  
21 don't think, at this point, has -- I'm not at all concerned  
22 about that.

23 As I've said, these are allegations of jus cogens  
24 violations. And even if he had some sort of immunity, it  
25 doesn't protect, in that respect, in my view, not in these

1 types of cases.

2 So I'm going to go ahead and at this point allow the  
3 TVPA claims to go forward in each of these complaints. I  
4 don't have any idea how in the world the plaintiffs will get  
5 discovery. My experience with the Somali cases that I had was  
6 it took years to get that discovery. And I think that the  
7 kind of activity that's going on right now in Libya is much,  
8 much stronger. I am, to make sure that we are not going to  
9 bump into a political question problem, however, going to  
10 follow the same route that I took in the *Samantar* case. And  
11 that is, I am going to address a letter to the State  
12 Department advising them essentially of what's before the  
13 Court in both these cases and give them an opportunity -- give  
14 the Department an opportunity to express its position. That's  
15 the safest way of handling these two cases.

16 And that being the situation, what I'm going to do  
17 is, I'm not going to issue a scheduling order at this point.  
18 I'm going to stay both cases. I'm going to give the State  
19 Department 60 days to voice any position, if it has one. If  
20 it doesn't do anything, then I'm going to assume the U.S.  
21 government doesn't have a concern about it. If they do, then  
22 we will, at that point, address what, if any, impact that  
23 position has on going forward with the remaining claim.

24 MR. LEVIN: Judge, this is Duncan Levin. If I may  
25 just address that. One issue for the Court is whether, if

1 there is a change in administration, allowing -- part of the  
2 issue is presenting a nonjusticiable political question is  
3 that the Court, respectfully, should not be stepping on the  
4 toes of the executive branch on something that has significant  
5 political overtones that obviously is at the core of diplomacy  
6 between the countries and the United States with regard to  
7 peace in the whole region.

8 As the election is coming up, if there is a change  
9 in administration, we would agree that -- depending on how the  
10 election holds, we may come back to the Court on the issue of  
11 a stay for 60 days, and whether that would hamstring the next  
12 administration, if there is a change of administration.

13 THE COURT: Mr. Levin, that's a reasonable request.  
14 And so, as I said, I'm going to stay the cases right now. And  
15 60 days from now would clear the election, so we would know,  
16 assuming we would know by that point what the outcome is, and  
17 depending upon that you can renew the -- ask for an extension,  
18 if it goes the other way. All right.

19 MR. LEVIN: Your Honor, if I also may just address  
20 one other issue that the Court raised earlier that I didn't  
21 have an opportunity to address.

22 The Court addressed some of the comments allegedly  
23 made by General Haftar showing that -- announcing that LNA  
24 opponents allegedly would be shown no mercy. I just wanted to  
25 address, in the broadest terms, those comments.

1           One is that, I just want to be clear that we are not  
2 asking the Court to say things are right or wrong. I'm a  
3 lawyer based in the United States, looking at whether this  
4 fits the criteria of the statute. So I know the Court said  
5 that the allegations are very problematic, and I'm not -- it's  
6 not our position to ask the Court to weigh in on whether the  
7 allegations are right or wrong, but whether the statute is  
8 met.

9           And those comments just -- just so the record is  
10 clear on it, those comments were made allegedly after the date  
11 that the conduct alleged to commit -- to have been committed  
12 by General Haftar took place.

13           So the allegations are that the conduct took place  
14 and that those comments took place after the allegations, not  
15 before the allegations. So I don't -- I don't particularly  
16 think they're relevant or, in fact, weigh at all as to General  
17 Haftar's involvement in these alleged activities.

18           And then the other thing is just -- I did -- I do  
19 want to address this notion of exhaustion of remedy is because  
20 it's something that we have not had an opportunity to address  
21 yet in this -- in this argument. But I do think that there is  
22 an element that is not -- it is not a technical requirement  
23 under the TVPA that a plaintiff has to exhaust local remedy.

24           And I think it's interesting that the Muna al-Suyid  
25 plaintiff has basically thrown their hands up at this whole

1 notion and they're citing to the *Mugabe* case, that the  
2 then-president of Zimbabwe, who disregarded a number of  
3 Zimbabwean court rulings, and that the *Elzagally* plaintiffs  
4 have basically said that they can't pursue anything that would  
5 be in court.

6 I don't think there's -- first off, there's no  
7 evidence in the record that the Libyan courts are not a proper  
8 place to pursue these claims, and they haven't even tried.

9 So I -- and to the extent that the *Elzagally*  
10 plaintiff have even tried, other than serve -- submitting one  
11 affidavit saying that they served General Haftar in a Libyan  
12 court -- which by the way, I will just mention, was  
13 in Tripoli, when they knew full well that General Haftar  
14 controls Benghazi, but not Tripoli. There's a civil war going  
15 on.

16 I just think that their lack of even trying to  
17 pursue these claims in the course of Libya is like skipping  
18 over a prerequisite that is codified in the -- in the Torture  
19 Victim Protection Act.

20 Again, I'm not trying to ask the Court to say that  
21 what is alleged is not horrendous. I'm not trying to ask the  
22 Court to make a value judgment. I'm just trying to look at  
23 what the statute itself says and whether the plaintiffs have  
24 met their burden. Exhaustion of remedy is just clearly part  
25 of it, but they haven't even tried. They haven't said they've

1 tried it. They've just sort of thrown up their hands with  
2 that. And I know you've heard my arguments on the other piece  
3 of this, which is that the killings weren't extrajudicial or  
4 deliberate.

5 But I do want to mention that in the TVPA, the  
6 Senate Report itself specifically carved out liability for  
7 collateral civilian casualties resulting from legitimate  
8 military operations undertaken in the civil war. I think  
9 Congress looks at these issues specifically in the TVPA and  
10 they said, number one, exhaust your remedies in a foreign  
11 country.

12 The plaintiffs in both of the cases haven't done it.  
13 They haven't said they've done it. They've basically argued  
14 that they don't need to do it, and they haven't reported  
15 back -- they're in different situations with regard to  
16 exhaustive remedies. But neither of them have -- I don't  
17 think that that is a technical requirement at all.

18 And secondly, I just don't think they've -- they're  
19 trying to create liability under the TVPA for something that  
20 the United States Congress had specifically carved out. The  
21 Senate Report itself specifically addresses civil war. It  
22 specifically addresses this in the Senate Report on the TVPA.

23 And so, I fully understand when the Court reads  
24 these allegations, understanding that they are "problematic,"  
25 as Your Honor has said. I don't ask the Court to weigh in on

1 that.

2 I just ask the Court to look at the actual -- the  
3 intent of Congress in making this law and then the specific  
4 requirement that they exhaust local remedy.

5 THE COURT: Well, as you know, that they've  
6 referenced to this Amnesty International report and other  
7 reports that even from their our own State Department  
8 commenting upon the situation of the court system in Libya  
9 right now. And some of the cases that you cite to do involve  
10 situations where the civil war conflict has ended and then the  
11 parties are able to use the court system that exists.

12 But at this point, again, I think given what I've  
13 got before me at this point, I'm satisfied that there's enough  
14 evidence that the functioning of the Libyan courts will not be  
15 sufficient to give them an -- a fair opportunity to raise  
16 these issues there. So I'm not going to change my view at  
17 this point.

18 So, as I've said, I'm allowing those two claims to  
19 go forward. One claim per complaint. I'm staying the case  
20 for 60 days to see if the State Department is going to make  
21 any statement. I will send you, obviously, copies of the  
22 letter that we send to State. It will probably get out  
23 tomorrow.

24 If it would assist the process, if either of you  
25 might know what desk or office at the State Department is

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1 responsible for what's going on in Libya. I have trouble  
2 believing that some of you might not know that.

3 MR. CARROLL: Your Honor, this is Kevin Carroll. It  
4 would be at least the Near East desk.

5 THE COURT: Just the Near East desk.

6 MR. CARROLL: At the Department of State.

7 THE COURT: All right. That's what we'll do. All  
8 right. Thank you gentlemen for calling in. We got through it  
9 with the technology being what it is. We'll get an order out  
10 to you today. We're signing off.

11 MR. LEVIN: Thank you, Your Honor.

12 MR. CARROLL: Thank you, Your Honor.

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14 **(Proceedings adjourned at 3:55 p.m.)**

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## CERTIFICATE OF REPORTER

3 I, Tonia Harris, an Official Court Reporter for  
4 the Eastern District of Virginia, do hereby certify that I  
5 reported by machine shorthand, in my official capacity, the  
6 proceedings had and testimony adduced upon the Motions  
7 hearing in the case of the **AIDA ELZAGALLY, et al., versus**  
8 **KHALIFA HAFTAR, et al.**, Civil Action No. 1:19-cv-853 and  
9 1:20-cv-170, in said court on the 29th day of September,  
10 2020.

11 I further certify that the foregoing 37 pages  
12 constitute the official transcript of said proceedings, as  
13 taken from my machine shorthand notes, my computer realtime  
14 display, together with the backup tape recording of said  
15 proceedings to the best of my ability.

16                           In witness whereof, I have hereto subscribed my  
17 name, this October 9, 2020.

Tonia M. Harris, RPR  
Official Court Reporter

Tonia M. Harris, RPR  
Official Court Reporter